Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1995

M. REX LUFT and JANICE LUFT,

Petitioners,

v.

FARMERS HOME ADMINISTRATION
and CENTURY BANK STERLING,
now known as KEY BANK OF COLORADO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I: Whether Lufts have the right to affirmatively defend against the loss of their farmstead where the Farmers Home Administration and Century Bank Sterling failed to offer the Luft family those rights enumerated in federal law and the relevant federal rules which structure the relationship between a farmer-borrower and the Farmers Home Administration and the relationship involving guaranteed lenders?

II: Whether Lufts have third-party-beneficiary contract rights under the Lender's Agreement and the Loan Note Guarantee, rights including opportunities for restructuring?

III: Whether the Federal Claims Court would have jurisdiction over this case if the Court of Appeals had transferred venue there?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

M. Rex Luft and Janice Luft respectfully petition for a writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

Petitioners-Luft seek review of an unreported decision of the United States Court of Appeals for the Tenth Circuit filed April 26, 1995; the petition for rehearing was denied by order entered June 14, 1995. The District Court had entered its judgment August 31, 1994.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254,

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the Constitution of the United States provides that "No person shall be * * * deprived of * * * property without due process of law."

STATEMENT OF THE CASE

This Petition raises fundamental questions concerning the power of the United States acting through the Farmers Home Administration and a bank to deny contractual and statutory rights owed to farmer-borrowers. The decisions in the present litigation from the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit controvert decisions from appellate Courts of North Dakota, Minnesota, Kentucky, Montana and Utah, as well as the Eighth and Ninth Circuits and the United States Claims Court.

M. Rex and Janice Luft farmed land in rural Sterling, Colorado. Their land had been mortgaged to Federal Land Bank and Century Bank Sterling. Federal Land Bank of Wichita had earlier foreclosed on part of Lufts' farm. Then, although Lufts' payments were current, Century Bank Sterling demanded payment in full from Lufts on its two loans, asserting that default had occurred when the other creditor attempted to obtain property in which the bank also had a security interest.

The Farmers Home Administration had guaranteed this Century Bank loan. Forms FmHA 449-34, the Loan Note Guarantee, 5 and 449-35, the Lender's Agreement, had been signed by FmHA and Century Bank. These

documents reflecting underlying federal law assured Lufts of specific rights if Lufts defaulted. These rights included an opportunity to meet with the bank and FmHA to consider options including restructuring and liquidation.

Instead, without any notice to Lufts, Century Bank and FmHA liquidated Lufts' indebtedness and the bank exercised its right of redemption from Federal Land Bank.

Lufts were then dispossessed by the bank.

COURSE OF PROCEEDINGS

The Farmers Home Administration removed the action from Colorado state court to federal district court where the United States District Court for the District of Colorado dismissed the action for want of subject matter jurisdiction; the constitutional takings claim was dismissed sua sponte.

The Tenth Circuit affirmed the District Court, reasoning that neither the FmHA regulations nor federal law offer a private right of action.

REASONS FOR GRANTING THE WRIT

I: The decision of the Tenth Circuit Court of Appeals conflicts directly with case law from three other federal courts and at least five State appellate courts which allows one to affirmatively defend where a lender fails to offer rights granted under federal law or obligations grounded in contract.

No implied private cause of action exists under the Agricultural Credit Act, Griffin v. Federal Land Bank of Wichita, 902 F.2d 22, 24 (10th Cir. 1990). The United States District Court used this proposition to summarily dismiss the Lufts' lawsuit against the Farmers Home

Administration and Century Bank Sterling.

7 C.F.R., Part 1980, Subparts A and B, regulations enacted under the Agricultural Credit Act, are available to Lufts to challenge the liquidation by FmHA and subsequent sale of their farm property by Century Bank Sterling.

In Farm Credit Bank of Spokane v. Parsons et al., 758 F. Supp. 1368, 1370-71 (D. Montana 1990), the Court stated that the viability of a defense to a foreclosure, a defense based on not having gotten one's rights under the Agricultural Credit Act, must be determined by State law. See Federal Land Bank v. Warner, 292 U.S. 53, 55 (1934).

Federal Land Bank of St. Paul v. Overboe, 404 N.W.2d 445, 449 (N.D. 1987), demonstrates that an agreement between a borrower and a federally-chartered lender gives the borrower explicit rights, although the North Dakota Supreme Court agreed that no private cause of action existed:

> Allowing [Federal Land Bank] to foreclose its mortgages without regard to the administrative forbearance regulations would be inimical to this goal [of administrative forbearance]. We therefore conclude that the failure of [Federal Land Bank] to comply with the administrative forbearance regulation and policies adopted pursuant to the regulations gives rise to a valid equitable defense to a foreclosure action under state law.

A Kentucky case, Lillard v. Farm Credit Services of Mid-America, 831 S.W.2d 626 (Ken. Ct. App. 1991)(rehearing denied, January 24, 1992; discretionary review dismissed by the Kentucky Supreme Court, June 16,

1992), followed Overboe.

In Burgmeier et al. v. Farm Credit Bank of St. Paul, 499 N.W.2d 43 (Minn. Ct. App. 1993), review by the Minnesota Supreme Court denied July 15, 1993), the Court voided a foreclosure by Farm Credit Bank because the Bank had not provided notice to the Burgmeiers that Farm Credit considered its loan to the Burgmeiers to be "distressed." See also Western Farm Credit Bank v. Pratt et al., 860 P.2d 376 (Utah App. 1993), for the additional requirement that a bank deal with its borrower in good faith.

In Farm Credit Bank of Spokane v. District Court of the Third Judicial District of the State of Montana et al., 881 P.2d 594, 606 (Mont. 1994) (rehearing denied Oct. 20, 1994), the Supreme Court of Montana held that an affirmative defense of failure to comply with the Agricultural Credit Act could be raised to thwart a mortgage foreclosure: "[N]one of the authorities cited by the [Farm Credit Bank] support the argument that in an equitable foreclosure action failure to comply with the Act's restructure requirements cannot be raised as an equitable defense."

The Federal Land Bank of Spokane v. L.R. Ranch Corp., 926 F.2d 859, 863 (9th Cir. 1990), held that "borrowers can, however, assert the bank's failure to comply with [federal law], along with its failure to comply with any other procedural or substantive requirements of the [law] as an equitable defense to foreclosure." Accord, Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990).

Colorado considers a foreclosures to be an equitable proceeding. Handy v. Rogers, 351 P.2d 819, 823-24 (Colo. 1960). A court may set aside a sale even after the foreclosure has been completed and the time for redemption has run. United Bank of Lakewood v. Jefferson Industrial

Bank, 791 P.2d 1250 (Colo. App. 1990). Lufts asked relief, under Colorado Court Rule 105, but were rebuffed by the Federal District Court and the Tenth Circuit.

> II: The Lufts have third-party-beneficiary contract rights under the Lender's Agreement and the Loan Note Guarantee, rights including opportunities for restructuring.

The issue of the Lufts' contractual rights under the Lender's Agreement was first raised at the initial motion hearing before the Honorable James Leh in Colorado State district court.

Farmers Home Administration utilized its own Form FmHA 449-34 and FmHA 449-35, to set out certain obligations of Farmers Home Administration and Century Bank Sterling vis-a-vis the Lufts.

The Lender's Agreement states in paragraph, II, that "[t]he Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation....".

Lender's Agreement, Paragraph X Default, relates options to be considered at a meeting after the borrower defaults, including deferment of principal payments, an additional temporary loan by the Lender to bring the account current, reamortization or rescheduling the payments, reorganization, liquidation, interest rate write-downs or buy-downs.

Wells Fargo Bank, N.A., v. United States, 26 Cl.Ct. 805 (1992), indicates that the Farmers Home Administration can be sued in federal court under contract or under a guarantee.

M. Rex Luft and Janice L. Luft are specifically named as the Borrowers, the individuals for whose benefit

the Farmers Home Administration has guaranteed the loan.

The United States Court of Federal Claims in Schuerman v. United States, 30 Ct.Cl. 420 (1994), determined that a Contract of Guarantee must be read as a third-party beneficiary contract. The Farmers Home Administration and Century Bank Sterling have also deprived Lufts of substantive due process rights. This is actionable under State law in Colorado against the Bank and under federal law since the United States must meet the obligations of its contracts as any private party would have to meet these obligations, Lynch v. United States, 292 U.S. 571, 580 (1933). Mr. M. Rex Luft by affidavit demonstrated that he had no prior knowledge of the redemption or liquidation of his loan by Century Bank until well after these had already occurred. Due process involves notice at a minimum; contract rights involve more.

III: The District Court or the Court of Appeals could have transferred this Luft case to the Federal Claims Court if these other courts lacked jurisdiction.

The federal District Court dismissed for want of jurisdiction. Order at 2. The proper course would have been for the District Court to transfer venue, with respect to the Farmers Home Administration, to Claims Court under 28 U.S.C. Section 1631.

The Claims Court can obtain jurisdiction by a plaintiff's filing a claim directly with that Court or the matter can be transferred to the Claims Court by a federal District Court which does not have jurisdiction, Johnson City Medical Center Hospital v. United States, 20 Cl.Ct. 515, 515-516 (1990).

The Claims Court accepted jurisdiction in Wells Fargo Bank, N.A., v. United States, 26 Ct.Cl. 805 (1992), where the Farmers Home Administration had breached its

agreement to issue a loan guarantee.

The Tucker Act, 28 U.S.C., Section 1491, permits the Claims Court to award damages for the violation of substantive rights embodied in the United States Constitution, federal statutes, or federal contracts. Hatter v. United States, 953 F.2d 626 (Fed. Cir. 1992).

CONCLUSION

The petition for writ of certiorari should be granted.

Dated at Minneapolis, Minnesota, this 12th day of September, 1995.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. REX LUFT, JANICE LUFT,	)	
Plaintiffs - Appellants,	)	
	)	
v.	)	No. 94-1476
	)	
FARMERS HOME ADMINISTRATION	)	
Defendants - Appellees	)	

ORDER
Entered June 14, 1995

Before MOORE, BARRETT, and EBEL, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. REX LUFT, JANICE LUFT, Plaintiffs - Appellants,	)	
v.	)	No. 94-1476
	)	D.C. No. 94-S-1430
FARMERS HOME ADMINISTRATION Defendants - Appellees	)	Dist . of Colorado

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ORDER AND JUDGMENT

Before MOORE, BARRETT, and EBEL, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. This case is therefore ordered submitted without oral argument.

M. Rex Luft and Janice Luft (the Lufts) appeal from the district court's Order granting Appellees', Key Bank of Colorado (Key Bank), formerly Century Bank of Sterling, and the Farmers Home Administration (FHA), motions to dismiss.

The Lufts brought this action against Appellees for damages and other relief stemming from the foreclosure and transfer of their farmstead. The Lufts alleged noncompliance with the Agricultural Farm Credit Act of

1987 (the Act). The district court granted the Appellees' motions to dismiss on the grounds that no private right of action exists for violations of the Act and, therefore, the court lacked subject matter jurisdiction.

On appeal, the Lufts contend that: (1) they have the right to affirmatively defend against the loss of their farmstead where the FHA and Key Bank failed to offer the Lufts those rights enumerated in federal law and the relevant federal rules which structure the relationship between a farmer-borrower and the FHA, as well as guaranteed lenders; (2) they were denied their third-party-beneficiary contract rights under the Lender's Agreement and the Loan Note Guarantee; (3) FHA and Key Bank cannot avoid federal subject matter jurisdiction by use of a Notice to Remove. The Lufts assert that in the interests of justice the case should be transferred in part to the United States Claims Court and the balance remanded to the state court.

We recognize that the Act does not provide a private right of action Griffin v. Federal Land Bank of Wichita, 902 F.2d 22, 24 (10th Cir. 1990). The exclusive remedy for a violation of the borrower's rights under the Act is administrative review. Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181, 1183 (8th Cir. 1990).

Therefore, we **AFFIRM** for substantially the reasons set forth in the district court's Order entered August 31, 1994.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court:
James E. Barrett,
Senior United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Sparr

Civil Action No. 94-S-1430

M. REX LUFT and JANICE LUFT,

Plaintiffs,

v.

FARMERS HOME ADMINISTRATION and CENTURY BANK STERLING,

Defendants.

ORDER

THIS MATTER comes before the Court on two motions to dismiss. The Farmers Home Administration (FmHA) files their motion to dismiss on July 20, 1994. Defendant Century Bank Sterling, now known as Key Bank of Colorado (the bank) filed its motion to dismiss on July 27, 1994. Plaintiffs filed their consolidated response on August 12, 1994. The Court has reviewed the motions and responses, the applicable law and is fully advised in the premises.

Defendant FmHA removed this action from Logan County District Court on June 16, 1994. The complaint alleges five separate claims: negligence (against Defendant FmHA); breach of contract (against both Defendants); fraud

(against both Defendants); breach of covenant of good faith and fair dealing (against Defendant FmHA); and a takings claim (this is apparently asserted against both Defendants).

The Plaintiffs owned a farm in Logan County. they lost their farm as a result of a foreclosure proceeding instituted by the Farm Credit Bank of Wichita. The Lufts had pledged their farm as collateral for a loan from the Farm Credit Bank of Wichita as well as the Defendant Bank. After Farm Credit Bank purchased the farm at the foreclosure sale, the Defendant Bank, holder of the second deed of trust, exercised its right of redemption and gave the Plaintiffs the opportunity to pay off the outstanding loans and the redemption certificate. The Plaintiffs were apparently unable to make the payments and the Bank later commenced eviction proceedings against them. Each of the Plaintiffs' claims, except for the one designated a "takings claims,: is premised upon rights based upon the Agricultural Credit Act. The Plaintiffs requested relief in the form of voiding the sale of their farm, compelling the FmHA to offer them restructuring rights available under the Agricultural Credit Act, and recovery of their farm equipment or its replacement value. They also seek money damages and attorney's fees.

The Court must first make the observation that, pursuant to Griffin v. Federal Land Bank of Wichita, 902 F.2d 22, 24 (10th Cir. 1990), there is no private right of action available to Plaintiffs to enforce the Agricultural Credit Act. There is therefore no subject matter jurisdiction over the Plaintiffs' claims. Plaintiffs' arguments regarding contracts of guaranty are inapposite, and that portion of the response pertaining to the Administrative Procedure Act has not bearing on the case before this Court. Because the Court has determined that it lacks jurisdiction to hear the Plaintiffs' first four claims, it is not necessary to dismiss the case on the other grounds

articulated in the motions to dismiss. With regard to the fifth claim for relief, it states simply:

> Lufts were denied their rights under federal law by a federally-chartered entity, the Farmers Home Administration, and by a federally-insured bank, Century Bank Sterling.
>
> This denial of the Lufts' rights by defendants constitutes a taking of property without due process of law in contravention of the Fifth Amendment of the United States Constitution and further constitutes a taking under the Constitution of the State of Colorado.
>
> This taking of the Lufts' property is a compensable taking under the Constitution of the United States for which the Lufts must be reimbursed.

This claim seems to assert that because the rights of the Plaintiffs' were allegedly violated by a federally chartered bank, with such alleged violation resulting in financial loss, this amounts to a taking by the federal and/or state government. This claim is property dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as well as Fed. R. Civ. P. 8 sua sponte.

Accordingly, for the reasons stated in this order, the motions to dismiss are **GRANTED. Plaintiffs' complaint is dismissed.** With regard to Defendant Bank's request for attorney's fees, any request for fees pursuant to Fed. R. Civ. P. 11 must be asserted in compliance with section (b)(1)(A) of that rule.

DATED at Denver, Colorado, this 31st day of August, 1994.

BY THE COURT
Daniel B. Sparr
United States District Judge